



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 19, 1997

Ms. Joni M. Vollman
Assistant General Counsel
Harris County District Attorney
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR97-2527

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110779.

The Harris County District Attorney (the "district attorney") received a request for information pertaining to "*State of Texas v. Danny Dean Thomas*, No. 346935 (Dist. Ct. of Harris County, 180th Judicial Dist. Of Texas 1982)." You state that some of the documents responsive to the request will be made available to the requestor, but assert that the remaining information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered your arguments and have reviewed the representative sample of information submitted.¹

Section 552.108, the "law enforcement exception," provides in part:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: . . . (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

See Act of June 1, 1997, H.B. 951, §1, 75th Leg., R.S. (to be codified at Gov't Code § 552.108). When a governmental body asserts that the information reflects the prosecutor's mental impressions or legal reasoning, we strongly encourage the governmental body, in its request for a ruling, to explain how the information does so.

¹For purposes of this decision, we assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You state that Exhibit A contains “documents that constitute the work product of the prosecutors.” Upon review of the information submitted, we conclude that it was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation, or reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude you may withhold Exhibit A under section 552.108(a)(3).

However, we note that “basic information about an arrested person, an arrest, or a crime” is not excepted from required public disclosure. Gov’t Code § 552.108(c). Basic information is the type of information that is considered to be front page offense report information even if this information is not actually located on the front page of the offense report. *See generally Houston Chronicle Publ’g Co.*, 531 S.W.2d at 187; Open Records Decision No. 127 (1976). Thus, you must release the basic information under section 552.108(c).

Next, you contend that Exhibits B, C, D, and E are excepted from public disclosure under section 552.101 of the Government Code in conjunction with several confidentiality statutes. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes.

You assert that the criminal history records in Exhibit B are protected by state and federal regulations. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history records information (“CHRI”) which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (the “DPS”) maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov’t Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Please note, however, that driving record information is not confidential under chapter 411, *see* Gov’t Code § 411.082(2)(B), and must be disclosed.

Section 611.002(a) of the Health and Safety Code makes communications between a patient and a professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional confidential. Section 611.004(d) provides that "[a] person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information." We have marked the records in Exhibits C and D that you must withhold under sections 611.002(a) and 611.004 of the Health and Safety Code.

We note that some of the information in Exhibit C is protected by section 552.101 in conjunction with common-law privacy. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We marked the information in Exhibit C that is protected by common-law privacy.

Additionally, we note that Exhibit E includes a medical record that is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Article 4495b protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Open Records Decision No. 598 (1991) at 2. The medical record, which we have marked, may only be released as provided by the MPA.

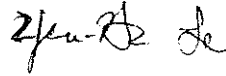
Finally, you assert that Exhibit F, which contains photographs of the deceased victim, is excepted from public disclosure by the constitutional privacy rights of the victim's family. Section 552.101 also excepts information that is confidential under constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.*

Texas law does not permit the family of a deceased person to maintain an action for the deceased's right of privacy because that right is personal, and a deceased person has no right of privacy. Open Records Decision No. 432 (1985), citing *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); see *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489 (Tex.

Civ. App.--Texarkana 1979, writ ref'd n.r.e.) (Texas does not recognize relational or derivative right of privacy). We conclude that disclosure of the photographs does not infringe upon the constitutional privacy rights of the deceased's family members. Therefore, the district attorney may not withhold the photographs from disclosure under section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 110779

Enclosures: Marked documents

cc: Mr. Jim Marcus
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(w/o enclosures)